No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF NICHOLAS BAGLEY, MICHAEL DORF, AZIZ HUQ, LEAH LITMAN, GILLIAN METZGER, JON D. MICHAELS, LAURENCE H. TRIBE, AND STEPHEN I. VLADECK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. RESPONDENTS HAVE STANDING 5

II. THIS DECISION IS NOT COMMITTED TO AGENCY DISCRETION BY LAW 10

A. Section 701(a)(2) Creates A Narrow Exception from Judicial Review 11

B. Secretary Ross's Decision to Add a Citizenship Question Is Not Exempt from Review Under Section 701(a)(2) 17

1. There Is Law to Apply Here 19

a. The Census Act 19

b. The Census Clause 22

c. Internal Agency Standards 24

2. There Is No Tradition Precluding Judicial Review 27

3. Judicial Review Is Workable and Essential to Prevent Abuses 29

4. Judicial Review Is a Vital Check Because Failure to Complete the Census Is a Federal Crime 31

III. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN ALLOWING EXTRA-RECORD DISCOVERY 33

CONCLUSION 37

APPENDIX – List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 13

Abbott Labs. v. Harris,
481 F. Supp. 74 (N.D. Ill. 1979) 35

Abramski v. United States,
573 U.S. 169 (2014) 32

Adams v. Watson,
10 F.3d 915 (1st Cir. 1993) 8

Air Transp. Ass'n of America Inc. v. Nat'l Mediation Bd., 663 F.3d 476 (D.C. Cir. 2011) 36

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,
397 U.S. 150 (1970) 8

Bar MK Ranches v. Yuetter,
994 F.2d 735 (10th Cir. 1993) 34

Bennett v. Spear,
520 U.S. 154 (1997) 21

Bd. of Trustees of Knox Cty. (Indiana) Hosp. v. Sullivan, 965 F.2d 558 (7th Cir. 1992) 22

California v. Ross, No. 18 Civ. 1865, 2018 WL 7142099 (N.D. Cal. Aug. 17, 2018) 24, 26

California v. Ross, No. 18 Civ. 1865, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019) 31

Camden v. Plotkin, 466 F. Supp. 44 (D.N.J. 1978) 27

Carey v. Klutznick, 508 F. Supp. 404 (S.D.N.Y. 1980) 27

Carey v. Klutznick, 637 F.2d 834 (2d. Cir. 1980) 27

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) ..... *passim*

Clinton v. City of New York, 524 U.S. 417 (1998) 3, 8

Cuomo v. Baldrige, 674 F. Supp. 1089 (S.D.N.Y. 1987) 27

Davis v. FEC, 554 U.S. 724 (2008) 3, 7

Dep't of Commerce v. Montana, 503 U.S. 442 (1992) 24

Dickson v. Sec'y of Def., 68 F.3d 1396 (D.C. Cir. 1995) 21

Doe 2 v. Shanahan,
917 F.3d 694 (D.C. Cir. 2019) 36

Dopico v. Goldschmidt,
687 F.2d 644 (2d Cir. 1982) 34

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 11

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 12, 26

Franklin v. Mass,
505 U.S. 788 (1992) ..... *passim*

Gill v. Whitford,
138 S. Ct. 1916 (2018) 5

Heckler v. Chaney,
470 U.S. 821 (1985) ..... *passim*

ICC v. Locomotive Engineers,
482 U.S. 270 (1987) 15, 18, 27, 28

I.N.S. v. Yueh-Shaio Yang,
519 U.S. 26 (1996) 25, 26

Jagers v. Fed. Crop Ins. Corp.,
758 F.3d 1179 (10th Cir. 2014) 36

Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cty., Maryland,
915 F.3d 256 (4th Cir. 2019) 37

Judulang v. Holder,
565 U.S. 42 (2011) 12

Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016) 21

Kravitz v. U.S. Dep't of Commerce,
336 F. Supp. 3d 545 (D. Md. 2018) 23, 24, 27, 31

La Unión del Pueblo Entero v. Ross,
353 F. Supp. 3d 381 (D. Md. 2018) 23

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 5, 7

Lincoln v. Vigil,
508 U.S. 182 (1993) ..... *passim*

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 3, 5, 9

Mach Mining, LLC v. E.E.O.C.,
135 S. Ct. 1645 (2015) 13, 16

Miss. Comm'n on Envtl. Quality v. E.P.A,
790 F.3d 138 (D.C. Cir. 2015) 36

Morton v. Ruiz,
415 U.S. 199 (1974) 25

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,
463 U.S. 29 (1983) 11, 14, 29

New York v. Salazar,
701 F. Supp. 2d 224 (N.D.N.Y. 2010) 35

New York v. United States Dept. of Commerce,
713 F. Supp. 48 (E.D.N.Y. 1989) 27

New York v. United States Dept. of Commerce,
739 F. Supp. 761 (E.D.N.Y. 1990) 27

NicSand, Inc. v. 3M Co.,
507 F.3d 442 (6th Cir. 2007) (en banc) 8

Philadelphia v. Klutznick,
503 F. Supp. 663 (E.D. Pa. 1980) 27

Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) 34, 35

Salazar v. King,
822 F.3d 61 (2d Cir. 2016) 25

Saratoga Dev. Corp. v. United States,
21 F.3d 445 (D.C. Cir. 1994) 34

S.E.C. v. Chenery Corp.,
318 U.S. 80 (1943) 34

Shapiro v. McManus,
136 S. Ct. 450 (2015) 21

Sherley v. Sebelius,
610 F.3d 69 (D.C. Cir. 2010) 8

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 3, 9, 10

TrafficSchool.com, Inc. v. Edriver Inc.,
653 F.3d 820 (9th Cir. 2011) 7

United States v. Apel,
571 U.S. 359 (2014) 32

United States v. Evans,
333 U.S. 483 (1948) 32

United States v. Kozminski,
487 U.S. 931 (1988) 32

Utah v. Evans,
536 U.S. 452 (2002) 17, 23, 24

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 36

Webster v. Doe,
486 U.S. 592 (1988) 15, 18, 19, 22, 28

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.,
139 S. Ct. 361, 370 (2018) ..... *passim*

Willacoochee v. Baldrige,
556 F. Supp. 551 (S.D. Ga. 1983) 27

Wisconsin v. City of New York,
517 U.S. 1 (1996) 22, 23, 24, 29

Young v. Klutznick,
497 F. Supp. 1318 (E.D. Mich. 1980) 27

CONSTITUTION AND STATUTES

U.S. Const., Art. I, § 2, cl. 3 23

2 U.S.C. § 2a 21

5 U.S.C. § 701(a)(2) ..... *passim*

5 U.S.C. § 706 33

5 U.S.C. § 706(2)(A) 12

13 U.S.C. § 5 21

13 U.S.C. § 141 21

13 U.S.C. § 141(a) 19, 20

13 U.S.C. § 141(b) 21

13 U.S.C. § 141(c) 21

13 U.S.C. § 221 ..... 4, 31

46 Stat. 21 19

71 Stat. 483 19

90 Stat. 2459 19

REGULATIONS

67 Fed. Reg. 38467 (June 4, 2002) 27

OTHER AUTHORITIES

Akhil Reed Amar, *America's Constitution: A Biography* 84 (2005) 17

Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285 (2014) 13

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Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431 (2018) 34

34 S. Rep. No. 94–1256 20

U.S. Br. in *Gundy v. United States*, No. 17-6086 32

U.S. Code Cong. & Admin. News 1976 20

INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose focus includes administrative and constitutional law. They have studied, taught, and written about standing, judicial review, jurisdiction, constitutional interpretation, and agency discretion. They have a strong interest in the development of the law—including the maintenance of a careful balance between deference to administrative agencies and judicial review of agency action. A list of *amici* is set forth in an appendix to this brief.[1]

SUMMARY OF ARGUMENT

The question here is not whether the Commerce Secretary has the statutory power to add a question about citizenship to the census. It is, instead, whether the Secretary adhered to the most elementary requirements of reasoned decisionmaking when he decided to do so. By virtue of the position taken by the government on appeal, this Court must also decide whether it is wholly precluded from policing arbitrary, capricious, and pretextual decisions by a political appointee regarding the census questionnaire.

In some respects, this is an exceptional case. The procedure by which the Secretary decided to add a citizenship question to the 2020 census violated many

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[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief. See Sup. Ct. R. 37.6.

rules of administrative law. Rarely is an agency action so thoroughly riddled with indicia of arbitrary and capricious decisionmaking. While the government insists that this was nothing more than a policy judgment, it was a judgment purportedly based on specific reasons. Yet those reasons collapse on even cursory inspection—as do the government's claims that these reasons had anything to do with the Secretary's foreordained conclusion.

In other respects, though, this is an ordinary case. The Secretary took an action that, by his own agency's account, will reduce response rates among specific groups and thereby cause injury to Respondents. The Secretary's decision, moreover, reversed decades of practice, violated his agency's own methodological standards, defied a widely-shared expert consensus, and departed from his statutory authority. Unsurprisingly, Respondents filed suit in federal court, contending that this agency action violated the Administrative Procedure Act (APA). Subsequently, when the district court found the government had presented a fictionalized and incomplete record, that court authorized limited discovery to ensure it was reviewing the *actual* record of the agency's decision. And finally, the court applied familiar administrative law principles to set the Secretary's decision aside.

On appeal, the government asserts that the only errors here occurred in the district court. As we will show, this contention is without foundation.

I. Respondents have Article III standing. The government's contrary argument rests on three basic errors. First, although the government suggests that

any harm resulting from the addition of a citizenship question is speculative, its own experts found (and then testified) that reduced response rates among noncitizens and Latino households are inevitable. Second, the government errs in asserting that the presence of third parties defeats traceability. Many cases have upheld standing where plaintiffs offered empirical proof or economic reasoning to show that alleged wrongdoing would predictably influence third parties in ways that cause injury. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 729 (2008); *Clinton v. City of New York*, 524 U.S. 417, 433 (1998); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Finally, no legal principle prohibits Respondents from establishing a causal chain merely because one link involves unlawful acts, particularly when there is no dispute that such acts will occur and cause injury. *Cf. South Dakota v. Wayfair, Inc.*,138 S. Ct. 2080 (2018).

II. Section 701(a)(2) of the APA does not bar judicial review. This narrow exception to the norm of review applies only when there is no law to apply, there is a well-recognized tradition of unreviewability, and the issue is decidedly unsuitable for review. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Here, the Census Act, the Census Clause, and the Census Bureau's own binding standards provide law to apply. Further, there is a long tradition of judicial review in this field, and the Secretary's decision is most certainly amenable to reasoned review under the APA (as evidenced by the decision below). That conclusion is bolstered by the significance of the census to our system of political representation and to the distribution of federal

funds among the states. Finally, precluding judicial review would be especially improper in light of the fact that failure to fully and truthfully answer any questions contained on the census questionnaire is a crime. *See* 13 U.S.C. § 221.

III. The district court did not abuse its broad discretion in allowing limited extra-record discovery. This is one of the extraordinarily rare cases in which there was a strong evidentiary basis for suspecting that the agency had presented a fictionalized account of its decisionmaking process. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). As a result, considering only the agency's self-selected record would have defeated the point of APA review. In arguing otherwise, the government offers a novel and incorrect legal test, conflates the standard for discovery with the standard for substantiating an APA claim, and improperly treats as irrelevant the record of procedural irregularity before the district court.

The bottom line is simple. The Secretary made a decision with momentous implications for the health and structure of our democracy. He did so through procedures that fail the minimal requirement of rationality, and then presented a fictionalized and incomplete account of his reasons to the reviewing court. The government now argues that this Court lacks any power to even consider a challenge to that decision. But the government is wrong. Under settled precedent, this Court must hear Respondents' claims on the merits—and, for the reasons given by Respondents, should affirm the judgment below.

ARGUMENT

I. RESPONDENTS HAVE STANDING

Article III requires "(1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Traceability exists where there is a "causal connection between the injury and the conduct complained of." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This is a lesser showing than proximate cause. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014).

Here, the government mistakenly contends that Respondents cannot show traceability because any injury resulting from an underreporting of residents would be fairly attributable "only to the actions of individuals who unlawfully refuse to truthfully and completely fill out and return the census form." U.S. Br. 17. This argument rests on three related errors.

First, it gets the facts wrong. Although the government suggests that it would be speculative to think *any* injury will occur, that position is at odds with the record that the Census Bureau meticulously compiled, the testimony that the government's expert offered at trial, and the remainder of the evidence below. It takes *chutzpah* for the government to dispute here the very factual conclusion that its own experts reached without any credible refutation.

To recap: Following the Department of Justice's "formal request" to add a citizenship question to the 2020 census, Census Bureau experts produced a series of memoranda assessing the likely impact of that proposal. Each confirmed that adding the question to the census would inevitably lead to a material decline in response rates among noncitizens and Latino households. *See* Pet. App. 42a–58a, 141a–44a. External stakeholders, including the Census Scientific Advisory Committee and the American Sociological Association, wrote to the agency with the same conclusion. The Commerce Secretary was left to search—fruitlessly—for any outside group willing to speak in favor of his proposal. *Id.* at 58a–63a.

The evidence at trial confirmed what the Census Bureau already knew. The government's own expert "testified to the soundness of the Census Bureau's analyses and conclusion that adding a citizenship question to the 2020 census would result in a differential decline in self-response rates among noncitizen households." *Id.* at 144a. He described an August 2018 memorandum from the Census Bureau as the "best analysis" available; it included a "conservative estimate" that the citizenship question would result in a 5.8 percent differential decline in response rates among noncitizen households. *Id.* at 145a. Respondents' three experts concurred in this assessment. Even the government's own lawyer had to admit that there was "'credible quantifiable evidence' that 'the citizenship question could be expected to cause a decline in self-response.'" *Id.* at 150a.

Thus, according to the government itself, the decision to add a citizenship question will predictably cause a reduced response rate among specific groups. This conclusion does not rank as speculative.

Second, the government wrongly insists that the presence of third parties necessarily breaks the causal chain between the Secretary's decision to add a citizenship question and Respondents' injuries.

A wall of Supreme Court precedent forecloses this contention. Those cases include campaign finance decisions recognizing injury-in-fact mediated through the predictable conduct of third parties. For example, in *Davis v. FEC*, 554 U.S. 724, 734–35 (2008), this Court held that a political candidate had Article III standing even though he would be injured only if he spent a certain amount of money, his opponent (a third party) decided to refrain from any comparable self-funding, and his opponent (again, a third party) then decided to avail himself of expanded contribution limits triggered by the candidate's spending.

In addition, the entire jurisprudence of Article III standing for antitrust and unfair competition claims presumes that courts may use empirical data and economic models to trace injury through decisions by third parties. *See Lexmark*, 134 S. Ct. at 1391 (noting that injury in Lanham Act cases involves an "intervening step of consumer deception," but this third-party step "is not fatal"); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011) ("The plaintiff can prove his injury using actual market experience and *probable* market behavior.

This makes sense, because proving a counterfactual is never easy, and is especially difficult when the injury consists of lost sales that are predicated on the independent decisions of third parties; *i.e.*, customers. A plaintiff who can't produce lost sales data may therefore establish an injury by creating a chain of inferences showing how defendant's false advertising could harm plaintiff's business." (quotation marks and citations omitted)); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (finding that 3M caused injury to its competitor when 3M offered better—and allegedly illegal—deals to third-party customers).

In a similar vein, this Court "routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (alterations omitted) (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13–14 (3d ed. 1994)). Time and again, the Court has held that businesses may challenge government decisions that advantage their competitors—even where those decisions would cause injury *only* if third-party market participants independently decide to follow economic incentives and patronize the businesses' competitors. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Sherley v. Sebelius*, 610 F.3d 69, 73–74 (D.C. Cir. 2010); *Adams v. Watson*, 10 F.3d 915, 921–25 (1st Cir. 1993).

Simply put, even when "standing depends on the unfettered choices made by independent actors not

before the courts," traceability exists when the plaintiff "adduce[s] facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (quotation marks omitted). Here, Respondents have carried that burden many times over. The evidence before the district court decisively demonstrates that adding a citizenship question will materially and predictably reduce response rates in clearly-defined populations. Tracing that outcome to the agency action does not call for speculation; it requires only a review of the record.

Finally, the government asserts—without any citation—that regardless of what the evidence shows, the law somehow forbids this Court from tracing causation through third-party acts when those acts are unlawful. U.S. Br. 18. (noting that it is unlawful not to fully and truthfully complete the census).

This is a perplexing argument. Article III takes the world as it is; not as the government (or anyone else) might wish it to be. *See Lujan*, 504 U.S. at 561 (requiring plaintiffs to demonstrate standing "in the same way as any other matter on which the plaintiff bears the burden of proof"). Indeed, the Constitution as a whole was written with a clear-eyed recognition that people aren't angels. *See* J. Madison, *Federalist Papers No. 51*, The Federalist Papers 322 (1961).

This Court, too, has based important decisions on the premise that people break the law. Consider *South Dakota v. Wayfair, Inc.*, which overruled precedent requiring a seller's physical presence in a

state before that state could tax the seller. 138 S. Ct. 2080 (2018). In overruling those cases—a step not taken lightly—the Court emphasized that "the physical presence rule results in significant revenue losses to the States." *Id.* at 2092. The reason for this revenue loss was that on-line consumers rarely pay their home states' use taxes, despite being legally required to do so. Although several Justices sharply disputed the decision to abandon precedent, nobody—not the majority, not the dissent, not the United States as *amicus*—objected to assessing that precedent on the basis that it caused harm by leading third parties to break the law.

Here, there is overwhelming proof that adding a citizenship question to the 2020 census will cause response rates to decline in selected populations. Rather than dispute this evidence, the government conveniently omits it. But when evaluated against the familiar requirements of Article III—which do not contain the government's manufactured limitations—the evidence plainly supports Respondents' standing.

II. THIS DECISION IS NOT COMMITTED TO AGENCY DISCRETION BY LAW

The government sweepingly asserts that federal courts are statutorily prohibited from reviewing any decisions by the Secretary regarding the "form and content" of the census questionnaire. *See* U.S. Br. 21–28. This argument is meritless. It not only misunderstands the APA, but also disregards the legal standard provided by the Census Act, the Census Clause, and the Census Bureau's own binding

rules. Moreover, the government's position bottoms out on a remarkable claim: that even if the Secretary fails to properly notify Congress of changes to the census, no court can hear any case challenging his decisions regarding one of the most fundamental instruments of political representation and funding allocation in our constitutional order. This Court should repudiate that suggestion, which defies text, history, and precedent.

A. Section 701(a)(2) Creates A Narrow Exception from Judicial Review

For well over a century, Congress has entrusted administrative agencies with wide-ranging regulatory powers. But it has not given agencies *carte blanche*. Instead, to "protect core constitutional and democratic values," it has firmly required "that agencies exercise only the authority that Congress has given them, that they exercise that authority reasonably, and that they follow applicable procedures." Pet. App. 13a. In short, through the APA, Congress has ensured "that agencies remain accountable to the public they serve." *Id.*

Central to the APA's safeguards is a requirement of "reasoned decisionmaking." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983). Not only must an agency's result be within the scope of its authority, but the process by which it reaches that result must be logical and rational. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must

give adequate reasons for its decisions."). To that end, the APA authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious." 5 U.S.C. § 706(2)(A).

To be sure, the APA does not authorize courts to "substitute [their] judgment for that of an agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). But "courts retain a role, an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("Congress passed the [APA] to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation. To achieve that end, Congress confined agencies' discretion and subjected their decisions to judicial review.").

Section 701(a)(2) creates an exception to the norm of judicial review for "agency action committed to agency discretion by law." But "on its face, [this] section does not obviously lend itself to any particular construction." *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Moreover, if read broadly, it would collide with Section 706(2)(A), which requires courts to set aside agency action that is "an abuse of discretion." *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) ("A court could never determine that an agency abused its discretion if all

matters committed to agency discretion were unreviewable.").[2]

This Court has therefore invoked a "presumption of review" and has "read the exception in § 701(a)(2) quite narrowly." *Weyerhaeuser*, 139 S. Ct. at 370; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). This presumption does not rest on doubt about the integrity or credibility of particular officials. Instead, it reflects a considered understanding of the legislative plan: "We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652–53 (2015).[3]

Consistent with the presumption of review, and as classically articulated in *Overton Park*, Section 701(a)(2) is a "very narrow exception" that precludes review only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (quotation marks omitted). In other words, Section 701(a)(2) is

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[2] "The APA's legislative history provides little help on this score." *Heckler*, 470 U.S. at 829; *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 695 (1990).

[3] Though not all *amici* endorse the presumption of reviewability, they all agree that "agency action is 'committed to agency discretion by law' in only the rarest of circumstances." Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1290 n.21 (2014).

restricted to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quotation marks omitted).

This rule rests on the premise that courts cannot assess whether an agency adhered to statutory criteria when the relevant statute lacks any discernible legal standard. *See id.* But even where a statute is written with extremely broad language, it is still possible for a court to assess whether an agency misunderstood key facts, departed from settled prior practice without a rational basis, or otherwise engaged in a clear error of law or logic. *See* Levin, *Unreviewability*, 74 Minn. L. Rev. at 708; *see also State Farm*, 463 U.S. at 43. While broad statutes may permit many possible policy judgments that are unamenable to review, it does not follow that they should be treated as precluding any review of an agency's reasoning on its own terms.

Perhaps for this reason, the Court's opinions addressing Section 701(a)(2) have focused on the existence of a recognized tradition of unreviewability, rather than asking only whether the statutory text is broadly worded. As the Court pointedly emphasized earlier this Term, "[t]he few cases in which we have applied the § 701(a)(2) exception involved agency decisions that courts have *traditionally* regarded as unreviewable." *Weyerhaeuser*, 139 S. Ct. at 370 (emphasis added); *see also Lincoln*, 508 U.S. at 192 ("Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts *traditionally* have regarded as

'committed to agency discretion.'"(emphasis added)). The Court has also considered whether the nature of the agency action raises practical questions about the competence or ability of courts to engage in judicial review. *See, e.g.*, *ICC v. Locomotive Engineers*, 482 U.S. 270, 282 (1987); *Heckler*, 470 U.S. at 831.

Applying these considerations, the Court has held that Section 701(a)(2) precludes review of agency decisions regarding the allocation of funds from a lump-sum congressional appropriation, *see Lincoln* 508 U.S. at 191, decisions not to reconsider final agency actions, *see ICC*, 482 U.S. at 282, decisions to fire CIA employees based on the national interest, *see Webster v. Doe*, 486 U.S. 592, 600 (1988), and decisions against instituting enforcement proceedings, *see Heckler*, 470 U.S. at 832. In three of these cases, the Court discussed at length the unbroken line of judicial and academic authority expressly stating that review is prohibited and unworkable. *See Lincoln*, 508 U.S. at 192–94; *ICC*, 492 U.S. at 279–81; *Heckler*, 470 U.S. at 829–34. The fourth case—*Webster*—was based on this Court's traditional wariness of second-guessing the executive branch on matters of national security. *See Lincoln*, 508 U.S. at 191–92 ("In *Webster*, . . . we held that § 701(a)(2) precludes judicial review of a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, an area of executive action 'in which courts have long been hesitant to intrude.'" (quoting *Franklin v. Mass*, 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in the judgment))); *Webster*, 486 U.S. at 607–11 (Scalia, J., dissenting).

Taken together, the Court's precedents applying Section 701(a)(2) hold that the APA precludes review only where a statute lacks any discernible standard, there is a well-recognized tradition of unreviewability, and the issue is unsuitable for judicial review. It is therefore unsurprising that the four cases denying review under Section 701(a)(2) all involved requests for courts to interfere with highly discretionary aspects of internal agency operations—which enforcement actions to bring, where to allocate lump sum appropriations, when to reopen final actions, and whom to trust with sensitive national security data. In those realms, separation of powers concerns are at their zenith, judicial competence is at its nadir, and there is a long, explicit history of unreviewability. This Court therefore applied Section 701(a)(2), precluding review unless Congress expressly provides for it.

Beyond these "rare circumstances," however, the presumption of judicial review applies with full force. *Lincoln*, 508 U.S. at 191. Review is the norm, not the exception. *See Mach Mining*, 135 S. Ct. at 1651. Agencies must adhere to the APA's requirement of reasoned decisionmaking, and generally must answer to the courts when they fail to do so. *See Franklin*, 505 U.S. at 796 ("The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.").

B. Secretary Ross's Decision to Add a Citizenship Question Is Not Exempt from Review Under Section 701(a)(2)

Designing, administering, and calculating results from the census is a vital national undertaking. "The population count derived from that effort is used not only to apportion Representatives among the states, but also to draw political districts and allocate power within them. And it is used to allocate hundreds of billions of dollars in federal, state, and local funds . . . Even small deviations from an accurate count can have major implications for states, localities, and the people who live in them." Pet. App. 6a.

Given the significance of the census, the Framers labored over it, choosing language "with precision" and requiring an "actual Enumeration." *Utah v. Evans*, 536 U.S. 452, 489 (2002) (Thomas, J., concurring in part and dissenting in part). "Future congressmen"—and, it seems safe to say, future presidential administrations—would thus be prevented from "devising some other sly formula to entrench themselves against demographic shifts." Akhil Reed Amar, *America's Constitution: A Biography* 84 (2005).[4]

In light of the towering importance of the census in the constitutional plan, the apportionment of

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[4] Because the Electoral College is affected by the census results, the Framers' fear of self-dealing also applies to the President. This is yet another reason why it could be troubling to conclude that Congress alone may check improper decisionmaking by the Commerce Secretary: the President's veto power might allow even irrational decisions to stand if they work to his benefit.

political representation at every level, and the distribution of benefits across states, it would be anomalous to conclude that a single political appointee wields unreviewable discretion to arbitrarily alter its content. That is particularly true where the relevant appointee violated the very statutory notice provisions designed to allow Congress an opportunity to raise and address concerns about the census. *See* Pet. App. 272a–84a; *see id.* at 128a (observing that Secretary Ross also gave "'admittedly imprecise,' if not false, testimony before Congress"). The legitimacy of our political system depends in no small part on an accurate population count. Allowing anyone judicially unfettered discretion to modify the census on grounds lacking any basis in fact or law—and in ways that will materially impair its accuracy—would be profoundly imprudent.

Consistent with that reality, Section 701(a)(2) does not preclude judicial review. Decisions about the form and content of the census are radically dissimilar from the discretionary decisions about internal agency operations addressed in *Heckler*, *Webster*, *ICC*, and *Lincoln*. That conclusion is confirmed by a review of the relevant statutory and constitutional provisions, traditions of judicial review, and the feasibility of APA review. It is also bolstered by cases that weigh against allowing executive officials unbounded discretion to define the substance of a federal crime.

1. There Is Law to Apply Here

The Census Act provides that the Secretary "shall . . . every 10 years . . . take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Seizing on the phrase "as he may determine," the government contends that Section 701(a)(2) applies because there is no standard to guide the Secretary's determinations—and thus no standard against which to judge them. *See* U.S. Br. 21–24. That is incorrect.

a. The Census Act

To start, the Census Act itself provides sufficient law to enable review. *See Webster*, 486 U.S. at 600 (calling for "careful examination of the statute on which the claim of agency illegality is based").

That is true even abiding the government's narrow focus on Section 141(a). As enacted in 1929, this provision stated, "That a census of population . . . shall be taken by the Director of the Census in the year 1930 and every ten years thereafter." 46 Stat. 21. A few decades later, Section 141(a) was modified to read, "The Secretary shall, in the year 1960 and every ten years thereafter, take a census of population." 71 Stat. 483. Not until 1976 did Congress add the phrase upon which the government now places total reliance: "in such form and content as he may determine." 90 Stat. 2459. But as Justice Stevens explained 27 years ago, there is no warrant for concluding that this addition was meant to preclude review under Section 701(a)(2):

> To the extent that the argument for unreviewability depends on this phrase, it requires the conclusion that when Congress amended the statute in 1976, it intended to effect a new, unreviewable commitment to agency discretion. There is no support for this position whatsoever. The main purpose of the 1976 amendment was to provide for a mid-decade census to be used for various purposes (not including apportionment). *See* S. Rep. No. 94–1256, pp. 2–3 (1976), U.S. Code Cong. & Admin. News 1976, p. 5463. The legislative history evidences no intention to expand the scope of the Secretary's discretion . . . Indeed, other portions of the Act limited the Secretary's authority by requiring, if feasible, the use of sampling in the nonapportionment census. 90 Stat. 2464, 13 U.S.C. § 195.

Franklin, 505 U.S. at 817 n.16, (Stevens, J., concurring in the judgment).[5]

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[5] In its entirety, the Senate Report on the new language in 13 U.S.C. § 141(a) read as follows: "Subsection (a) of section 141 essentially rewords the existing subsection, adding the term 'decennial census of population' so as to distinguish this census, to be taken in 1980 and every ten years thereafter, from the mid-decade census, which is to be taken in 1985 and every ten years thereafter. New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94–1256, at 4, U.S. Code Cong. & Admin. News 1976, p. 5466.

The government reads the current text of Section 141(a) in a void. When set in historical context, the statute does not reveal any legislative desire to vest unreviewable power in the Secretary. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency . . . . However, such language does not mean the matter is *committed* exclusively to agency discretion.").

Any doubt on that score is dispelled by a review of the broader statutory scheme. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997). Section 141(a) itself imposes a mandatory duty on the Secretary by using the word "shall." *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *Shapiro v. McManus*, 136 S. Ct. 450, 454 (2015). So, too, do many other provisions of the Census Act. *See, e.g.*, 13 U.S.C. §§ 5, 141(b), (c). Moreover, "the relationship of the census provision contained in 13 U.S.C. § 141 and the apportionment provision contained in 2 U.S.C. § 2a demonstrates that the Secretary's discretion is constrained by the requirement that she produce a tabulation of the 'whole number of persons in each State.'" *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in the judgment) (quoting § 2a(a)).[6]

Given these commands, and the history of Section 401(a), it cannot be said that the Census Act as a

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[6] For example, the Commerce Secretary would surely violate the Census Act if he modified the census questionnaire to ask only a single question: "What's your favorite color?"

whole "exudes deference" to the Secretary. *Webster*, 486 U.S. at 600. Although it vests him with policy discretion in administering certain aspects of the census, including its form and content, the Act imposes several mandatory obligations that apply directly to designing and administering the census. *See Bd. of Trustees of Knox Cty. (Indiana) Hosp. v. Sullivan*, 965 F.2d 558, 563 (7th Cir. 1992). Further, as evidenced by its relationship to Section 2a, the Act is not neutral or indifferent as to how the Secretary exercises his discretion: the Act imposes a "duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Franklin*, 505 U.S. at 820 (Stevens, J., concurring in the judgment). This is a meaningful standard against which exercises of discretion can be measured. *See Overton Park*, 401 U.S. at 410.

b. The Census Clause

In addition to the Census Act, the Constitution itself provides a legal standard sufficient to support APA review. *See Wisconsin v. City of New York*, 517 U.S. 1, 18–20 (1996) (explaining that the Census Act delegates Congress's broad constitutional authority over the census to the Secretary). Article I, Section 2 of the Constitution, as modified by the Fourteenth Amendment, provides that Members of the House of Representatives "shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State . . . ." To ensure that the apportionment remains representative of the current population, the Constitution further requires that a census be taken

at least every 10 years: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct." U.S. Const., Art. I, § 2, cl. 3.

In *Wisconsin v. City of New York*, this Court held that "the Secretary's conduct of the census" must be "'consistent with the constitutional language and the constitutional goal of equal representation.'" 517 U.S. at 19–20 (quoting *Franklin*, 505 U.S. at 804). It added that the Secretary's decisions must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20. More recently, while recognizing that the Framers did not establish "the precise method by which Congress was to determine the population," this Court emphasized that many constitutional design choices reflected in the Census Clause "suggest a strong constitutional interest in accuracy." *Utah*, 536 U.S. at 478.

"[I]t must follow that when the Census Bureau unreasonably compromises the distributive accuracy of the census, it may violate the Constitution." *La Unión del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 393 (D. Md. 2018). "[T]he Constitution imparts a judiciable standard on Congress when conducting an 'actual Enumeration'—it must bear 'a reasonable relationship to the accomplishment of an actual enumeration of the population.' And that standard is, in essence, what Congress has passed along to the Secretary." *Kravitz v. U.S. Dep't of Commerce*, 336

F. Supp. 3d 545, 568 (D. Md. 2018) (citation omitted). "[A] 'reasonable relationship' standard imposes deferential yet concrete limitations on the Secretary's exercise of discretion. For example, one would expect the Secretary could be precluded from printing all census questionnaires in Greek or in illegible font." *California v. Ross*, No. 18 Civ. 1865, 2018 WL 7142099, at *10 (N.D. Cal. Aug. 17, 2018) (Seeborg, J.).

This standard is manageable and amenable to enforcement through APA review. *Cf. Franklin*, 505 U.S. at 801 n.2 (citing *Dep't of Commerce v. Montana*, 503 U.S. 442, 456–459 (1992)). While the government seeks to confine *Wisconsin* and *Utah* to calculation methodology challenges, nothing in the language or logic of those opinions suggests any such limitation on the general principles they articulate. To the contrary, "reviewing the 'actual Enumeration' necessarily involves looking into the 'Manner' in which the count is conducted." *Kravitz*, 336 F. Supp. 3d at 563; *accord Wisconsin*, 517 U.S. at 13 ("In recent years, we have twice considered constitutional challenges to the *conduct of the census*." (emphasis added)). The Constitution thus affords a sufficiently clear legal standard to facilitate reasoned judicial review and defeat application of Section 701(a)(2).

c. Internal Agency Standards

The OMB's Statistical Policy Directives and the Census Bureau's own Statistical Quality Standards supply a third, distinct source of law to apply, thus permitting review under the APA. *See* Pet. App.

302a–04a (explaining these methodological materials).

"To determine whether there is 'law to apply' that provides 'judicially manageable standards' for judging an agency's exercise of discretion, the courts look to the statutory text, the agency's regulations, and informal agency guidance that govern the agency's challenged action." *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) (citations omitted). "Agency regulations and guidance can provide a court with law to apply because, [a]s the Supreme Court noted 'where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.'" *Id.* (internal citation omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)). Put differently, "[t]hough the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, or an abuse of discretion." *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

The notion that an agency can structure and thus constrain its discretion by committing to specific substantive or procedural limitations on its own decisionmaking is a familiar one. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 Mich. L. Rev. 1239, 1248 (2017) ("The most commonly recognized forms of internal

administrative law are the processes, guidelines, and policy issuances that an administrative agency adopts to structure the actions of its own officials."); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 Yale L.J. 1032, 1064 (2011) ("In such cases, the agency has voluntarily adopted a rule that constrains its own discretion . . . If the agency adopts the rule in the proper way, then . . . a court will enforce the rule against the agency in the future.").[7]

Here, a "substantial body of federal regulations and Census Bureau policies also provide manageable standards against which the Secretary's actions can be measured." *California*, 2018 WL 7142099, at *13. "In particular, the Bureau's own Statistical Quality Standards guide the process—from planning to collecting to analyzing and reporting—of producing Bureau information products," including questions for the census form. *Ibid.* "These internal agency standards provide 'law to apply' in evaluating the Secretary's exercise of his discretion." *Ibid.*; *see also Fox Television Stations, Inc.*, 556 U.S. at 515 ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Yueh-Shaio Yang*, 519 U.S. at 32

[7] *Amici* disagree over the extent to which internal agency law should be judicially enforceable under the APA, but they agree that it is used to support reviewability under current doctrine. *See* Metzger & Stack, *Internal Administrative Law*, at 1281-86, 1295-97.

(prohibiting an "irrational departure" from agency policy).[8]

2. There Is No Tradition Precluding Judicial Review

The Court's decisions addressing Section 701(a)(2) have assigned substantial—often determinative—weight to the existence of a longstanding, recognized tradition of unreviewability. *See Weyerhaeuser*, 139 S. Ct. at 370; *Lincoln*, 508 U.S. at 192; *ICC*, 482 U.S. at 282; *Heckler*, 470 U.S. at 829–32.

No such tradition supports the application of Section 701(a)(2) here. As Justice Stevens observed in *Franklin*, "[t]he great weight of authority supports the view that the conduct of the census is not 'committed to agency discretion by law.'" 505 U.S. at 819 n.19 (Stevens, J., concurring in the judgment) (citing *Carey v. Klutznick*, 637 F.2d 834 (2d. Cir. 1980); *New York v. United States Dept. of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990); *New York v. United States Dept. of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989); *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987); *Willacoochee v. Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983); *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980); *Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980); *Camden v. Plotkin*, 466 F. Supp. 44 (D.N.J. 1978)); *see also Kravitz*, 336 F. Supp. 3d at 562 ("[A] number of lower courts have

[8] The Statistical Quality Standards were the product of a formal rulemaking-type process. *See* 67 Fed. Reg. 38467 (June 4, 2002).

also reviewed the legality of Census Bureau actions." (collecting cases))).

The government seeks to escape the weight of these cases by noting that none addressed the precise question at issue here. *See* U.S. Br. 23–24. But many of them addressed challenges to decisions by the Commerce Secretary under Section 141(a)—the very same statute whose text supposedly "exudes deference" to the agency. And no case even hinted at any lurking exception for suits alleging that the Secretary violated the APA or Census Clause in altering the content of the census form. Unlike in *Lincoln*, *ICC*, *Heckler*, and *Webster*, where courts had long articulated an express unwillingness to review the relevant kind of agency action, here courts have long engaged in precisely the kind of review that Respondents seek—and have done so under the same provisions Respondents invoke. *See Franklin*, 505 U.S. at 818–19 (Stevens, J., concurring in the judgment) ("[T]he Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security . . . or those seeking review of refusal to pursue enforcement actions. These are areas in which courts have long been hesitant to intrude. The taking of the census is not such an area of traditional deference." (citations omitted)).

There are good reasons for the manifest judicial unwillingness to abandon this field. "The open nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government. The reviewability of decisions relating to

the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Id.* at 818; *see also Wisconsin*, 517 U.S. at 5–6 (describing the implications of the census for apportioning House seats and Electoral College votes, dispensing federal funds to state governments, and drawing intrastate political districts).

3. Judicial Review Is Workable and Essential to Prevent Abuses

The government contends that judicial review is unworkable because of the many policy judgments and trade-offs involved in designing the census form. *See* U.S. Br. 24. That's simply untrue. As the district court demonstrated in its thorough opinion, this case involves exactly "the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion under § 706(2)(A)." *Weyerhaeuser*, 139 S. Ct. at 371.

Indeed, Respondents' challenges here raise run-of-the-mill *State Farm* issues: Did the agency consider all aspects of the problem? Did it study the relevant evidence and arrive at a decision rationally supported by that evidence? Did it comply with all applicable procedures and substantive laws? Did it articulate the facts and reasons (the *real* reasons) for its decision? The proof of the pudding is in the eating—and here, the opinion below, as well as the opinions of other district courts, demonstrates the feasibility of applying APA review in a manner that respects the Secretary's broad discretion while requiring that he respect elementary rules of reasoned decisionmaking.

As explained above, actions by the Secretary that substantially decrease accuracy without any offsetting policy benefit are inconsistent with the Census Act and Census Clause. Where such actions rest on clear errors of fact, involve unexplained departures from prior practice, violate the agency's own rules or other statutory mandates, or are based on demonstrably pretextual reasons, they violate the APA. There is a line between exercising broad policy discretion, on the one hand, and arbitrary, irrational, or pretextual decisionmaking, on the other. Here, there is powerful evidence that the Secretary repeatedly and knowingly crossed that line. As the district court concluded:

> He failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations. On top of that, Secretary Ross acted without observing procedures required by law, including a statute requiring that he notify Congress of the subjects planned for any census at least three years in advance. And finally, the evidence establishes that Secretary Ross's stated rationale, to promote VRA enforcement, was pretextual—in other words, that he

> announced his decision in a manner that concealed its true basis rather than explaining it, as the APA required him to do.

Pet. App. 10a; *see also id.* at 284a–335a; *California v. Ross*, No. 18 Civ. 1865, 2019 WL 1052434, at *61–*66 (N.D. Cal. Mar. 6, 2019); *Kravitz v. U.S. Dep't of Commerce*, 355 F. Supp. 3d 256, 267 (D. Md. 2018).

Particularly where the Secretary plays fast and loose with congressional notification rules, the judiciary may be the only branch of government capable of policing his compliance with requirements of basic reasonableness. That isn't a terribly high standard, and it will leave room for controversial judgments, but it's the very least the nation can expect of political appointees vested with so much power over something so important.

4. Judicial Review Is a Vital Check Because Failure to Complete the Census Is a Federal Crime

Under 13 U.S.C. § 221, residents commit a federal crime if they fail to fully and truthfully answer the census questionnaire. In the government's view, the Census Act vests the Secretary with legally unbounded, judicially unreviewable discretion to add inquiries to that questionnaire. Put differently, the government asserts that the Secretary has limitless power to criminalize failing to answer whatever questions he sees fit to include on the census. That position raises grave concerns about executive branch overreach in the criminal sphere.

To be clear, Congress undoubtedly enjoys broad leeway to delegate to administrative agencies, which possess the expertise to implement general policies via rulemaking, adjudication, and other procedures. Such delegation is a central and desirable part of modern democratic governance. Further, it is not unusual for Congress to give agencies a role in the process of defining federal criminal law; for example, Congress has written many statutes that vest agencies with the authority to prescribe substantive requirements in rules and regulations, while separately making it a crime to violate those requirements. *See* U.S. Br. 45 & nn.10–11, in *Gundy v. United States*, No. 17-6086.

But not all delegations are created equal. This Court has long emphasized Congress's primary role in defining crimes. *See United States v. Kozminski*, 487 U.S. 931, 949 (1988); *United States v. Evans*, 333 U.S. 483, 486 (1948). It has also denied *Chevron* deference to executive branch interpretations of criminal laws, emphasizing the need for a judicial check. *See United States v. Apel*, 571 U.S. 359, 369 (2014); *Abramski v. United States*, 573 U.S. 169,191 (2014). Simply put, unconstrained discretion for any executive official to unilaterally demarcate criminal liability is in clear tension with our scheme of checks and balances. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 990 (2006).

In light of these principles, the intrusion on liberty caused by an agency action that affects the substance of a federal crime decisively favors

allowing judicial review. Just imagine if the Secretary added questions about firearm ownership, prior drug use, HIV status, employment of undocumented migrants, or specific religious and political beliefs. And imagine if Census Bureau experts unanimously opined that adding any such question would materially reduce response rates—thus lowering accuracy while making more Americans into criminals. On the government's view, the only recourse is in Congress, no matter how arbitrary or irrational the decision (and no matter if Congress was informed in a timely manner). As these examples suggest, the fact that the government's position would create a sphere of unfettered discretion in a criminal context is another reason to reject it.

III. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN ALLOWING EXTRA-RECORD DISCOVERY

Relying entirely on the administrative record, the district court held that the Secretary violated the APA. The district court added that this conclusion is only confirmed by extra-record evidence. The government has consistently maintained that the district court erred in such allowing such discovery. The Court need not reach that issue. But if it does, it should hold that the district court acted witnin its broad discretion.

APA review encompasses the "whole record," 5 U.S.C. § 706—everything "before the [agency] at the time [it] made [its] decision," *Overton Park*, 401 U.S. at 420. Formal rulemakings usually produce an

undisputed record. But informal action requires an agency to decide which materials to designate as part of the record. Courts presume regularity in agency procedures for designating records. *See Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). When faced with "clear evidence" of missing items, courts can order completion of a record. *See Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982).

In rare cases, however, a court may have strong reason to suspect that the record does not reflect the real reasons for the agency's decision. In such cases, limited discovery into the decisionmaking process may be required to assess whether the agency's proffered reasons are *actually* the "grounds upon which the [agency] itself based its action." *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *see* Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431, 2433–34 (2018). Such discovery is confined to identifying considerations that the agency relied upon while making its decision.

Overton Park allows extra-record discovery only upon "a strong showing of bad faith or improper behavior." 401 U.S. at 420. Stated differently, extra-record discovery is permissible only when there is powerful reason—supported by evidence—to believe that the agency has presented a fictionalized account of its decisionmaking process. When that occurs, confining judicial review to the designated record would make a mockery of the APA. *See, e.g.*, *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457–58 (D.C. Cir. 1994); *Portland Audubon Soc. v.*

Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993).

The *Overton Park* standard is highly fact-intensive. *See Abbott Labs. v. Harris*, 481 F. Supp. 74, 78 (N.D. Ill. 1979) (describing a "judgment in which the judicial reluctance to intrude into the decisional process of the agency having special competence is overborne by the conclusion that the process may well have gone awry"). Generally, though, there are two relevant kinds of evidence: *direct* evidence of prejudgment, pretext, or illicit motives, and *circumstantial* evidence that the procedures used to arrive at a decision (or designate a record) varied markedly from regular procedure in ways that give the reviewing court reason to doubt the record placed before it.

Here, the district court authorized extra-record discovery based on extraordinarily powerful direct *and* circumstantial evidence, which Respondents have ably recounted in their briefs. *See also* Pet. App. 524a–27a. This decision was well within the district court's broad discretion.

The government's contrary view—which no court, scholar, or agency has ever articulated—lacks merit. Most notably, it would allow plaintiffs discovery under *Overton Park* only if they had already come forward with enough evidence to prevail on the merits of their APA claim. *See, e.g.*, *New York v. Salazar*, 701 F. Supp. 2d 224, 243 (N.D.N.Y. 2010). That rule would render such discovery unnecessary and irrelevant. It also misses the whole point of this doctrine. *Overton Park* requires a strong *initial*

showing of substantive or procedural impropriety, which reflects the need to balance deference to the agency against the requirement that courts must review real—not fictionalized—agency records.[9]

The government further errs in suggesting that major departures from agency procedures must be disregarded. In many areas of law, including this one, unexplained and notable procedural irregularity is recognized as powerful evidence of improper or illicit motive. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977); *Doe 2 v. Shanahan*, 917 F.3d 694, 699 (D.C. Cir. 2019); *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cty., Maryland*, 915 F.3d 256, 263 (4th Cir. 2019).

At bottom, the government's position on the bad faith standard, and its positions throughout this litigation, are nothing short of an effort to build a wall around the administrative state that is impervious to judicial checks and balances. We appreciate the importance of judicial deference to agencies, especially to senior executive branch

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[9] It is telling that the government relies principally on cases that address the *merits* of APA claims based on improper motive, rather than the standard for *discovery*. *See Miss. Comm'n on Envtl. Quality v. E.P.A.*, 790 F.3d 138, 183 (D.C. Cir. 2015); *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1184-85 (10th Cir. 2014). Further, the single discovery case that the government cites—*Air Transport Association of America Inc. v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011)—is actually supportive of Respondents, not the government. *See id.* at 487-88 (holding that "if a party makes a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record, it should be granted limited discovery").

officials, and we, too, would warn against any effort to permit free-wheeling judicial intrusion into agency decisions. But here, the evidence of arbitrary, capricious, improper, and pretextual decisionmaking is comprehensive and unassailable. This is thus the rare case in which it was not only permissible, but appropriate, for the district court to authorize limited extra-record discovery.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment of the district court.

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Respectfully submitted,

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